

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

)	
In the matter of)	
)	
RAMBUS INCORPORATED,)	Docket No. 9302
)	
a corporation.)	
)	

**MICRON TECHNOLOGY’S MOTION TO LIMIT OR QUASH
RAMBUS’S NOVEMBER 6, 2002 SUBPOENAS AD TESTIFICANDUM AND
SUBPOENAS DUCES TECUM (Public Version)**

Pursuant to Rule 3.34(c) of the Rules of Practice for Adjudicative Proceedings before the United States Federal Trade Commission, non-party Micron Technology, Inc. (“Micron”), for itself and on behalf of subpoenaed witnesses Steven Appleton, Gene Cloud, Terry Lee, Jeff Mailloux, Roger Norwood, Kevin Ryan, Brian Shirley, Terry Walther, Keith Weinstock, and Brett Williams, hereby moves to limit or quash the subpoenas ad testificandum and subpoenas duces tecum that were served on the above witnesses on November 6, 2002.¹

INTRODUCTION

Micron is not a party to these proceedings. Nor is Micron in a different position than other non-party DRAM manufacturers. Like those other non-parties, Micron is a member of the JEDEC standard setting organization and is one of the many targets of

¹ This motion is timely filed with the Administrative Law Judge, as Rambus agreed in writing to extend the deadline for filing this motion to and including November 19, 2002.

Rambus's anticompetitive scheme. Yet, Rambus appears to have singled out Micron in these proceedings by serving it with 10 deposition and document subpoenas that are directed to nine current officers and employees (including Micron's Chief Executive Officer) and one former Vice President.²

Responding to this discovery and pulling all of these witnesses away from Micron's business for days at a time will impose enormous burdens on Micron and its employees, particularly during these difficult economic times. As Rambus knows, many of these subpoenaed witnesses play important roles in Micron's management and operation, including its engineering and marketing functions.

The burden on non-party Micron is particularly great when compared to Rambus's limited need for the deposition discovery it seeks. Micron and Rambus are parties to a lawsuit that is pending in the United States District Court for the District of Delaware, C.A. No. 00-792 (the "Delaware Action"). There, Micron has alleged, among other things, that Rambus fraudulently failed to disclose patents and patent applications to JEDEC in violation of JEDEC policy and that Rambus engaged in misconduct in an attempt to monopolize the markets for Synchronous DRAMs and Synchronous DRAM technology in violation of Section 2 of the Sherman Act.

Significantly, Rambus recently deposed all but one of the 10 Micron witnesses in the Delaware Action that it now seeks to depose again in these proceedings. In fact, in 2001, Rambus deposed five of the subpoenaed Micron witnesses for two days and one of the subpoenaed Micron witnesses for three days. During these depositions, Rambus

² Rambus also has served a deposition and document subpoena on another current Micron Vice President, Jan Du Preez, although Micron understand that his testimony will concern his prior employment with another DRAM manufacturer.

examined Micron's witnesses about the same or similar issues that arise in these proceedings, including JEDEC's patent policy, the conduct of Rambus and other JEDEC members at JEDEC before, during, and after Rambus's membership, presentations, proposals, and ballots relating to JEDEC's standardization of SDR and DDR SDRAM, alternatives to JEDEC's SDR and DDR SDRAMs (and technologies used therein), the design and operation of Micron's JEDEC-compliant SDR and DDR SDRAMs, Rambus's patents and intellectual property, Intel's decision to adopt Direct RDRAM, and license negotiations with Rambus over its proprietary Direct RDRAM technology. Subjecting these witnesses to re-deposition on issues that Rambus had a full opportunity to examine them on just one year ago places an inordinate and unnecessary burden on the witnesses and on Micron.

Micron does not contend that it is exempt from discovery in this case simply because Rambus has conducted extensive discovery of Micron in the Delaware Action. Indeed, Micron is making a further production of documents in response to a subpoena duces tecum served by Rambus, and Micron understands that the thousands of documents which Micron produced to the FTC staff during the investigation also have been provided to Rambus. In addition, even though Steven Appleton, Terry Lee, Brett Williams, and Brian Shirley already were deposed extensively by Rambus in the Delaware Action, Micron is prepared to incur the burden and expense of producing each of these witnesses again for one day of deposition on topics not covered during their depositions in the Delaware Action, because complaint counsel has listed these four witnesses on its preliminary witness list and Rambus may need to cross-examine them at the hearing. Because the other witnesses either already have been deposed in the Delaware Action or

are not on complaint counsel's preliminary witness list, Micron requested that Rambus limit its depositions to these four witnesses and withdraw the other subpoenas. Rambus insisted on being able to depose all 10 Micron witnesses, seven of them on a "high priority" basis, thereby necessitating this motion.

FACTUAL BACKGROUND

A. Depositions Taken By Rambus in the Delaware Action

Based upon its extensive deposition campaign in the Delaware Action in 2001, Rambus already has examined Micron witnesses extensively on issues relevant to this proceeding. Rambus took over 250 hours of deposition testimony in the Delaware Action. Bobrow Decl. ¶ 3. In doing so, Rambus deposed no fewer than 49 witnesses, 29 of whom are current Micron officers and employees. Id. Those witnesses include Micron's Chief Executive Officer, members of Micron's Board of Directors, its current and former JEDEC representatives, and many of its engineering and marketing directors and managers. Id. During these depositions, Rambus examined witnesses on over 700 documents that were marked as deposition exhibits. Id. Rambus questioned Micron witnesses extensively about JEDEC patent policy, the conduct of Rambus and others at JEDEC, the JEDEC standards for SDR and DDR SDRAM, the features and operation of Micron's JEDEC-compliant SDR and DDR SDRAMs, alternative DRAM architectures and features (such as Burst EDO, SyncLink, and SLDRAM), Rambus's patents and intellectual property, Intel's decision to adopt Direct RDRAM, and licensing issues. Id. ¶¶ 6-14.

B. Rambus's November 6, 2002 Subpoenas

On November 6, 2002, Rambus served Micron with deposition and document subpoenas for nine current Micron officers and employees and one former Micron Vice President. Bobrow Decl. ¶ 4. Each subpoena duces tecum includes an identical request for documents. Bobrow Decl., Exh. A. Based on the document requests, it appears that Rambus is interested in examining these witnesses about JEDEC, the JEDEC patent policy, DRAM consortia other than JEDEC (such as SyncLink and SLDRAM), Intel's adoption of Direct RDRAM, Rambus's proprietary technology and intellectual property, and alternative technologies to JEDEC SDR and DDR SDRAMs.

In the Delaware Action, Rambus already has deposed nine of the 10 Micron witnesses it has subpoenaed in this proceeding. Bobrow Decl. ¶ 5. As detailed below, Rambus thoroughly deposed these witnesses, in some cases over multiple days, about many of the same topics at issue in this proceeding:

1. Steven Appleton (Micron's Chairman of the Board, CEO, and President): Rambus deposed Mr. Appleton for two days on April 20 and July 23, 2001. This resulted in over 300 pages of testimony. Rambus marked or used 10 exhibits during the deposition. Rambus examined Mr. Appleton about, among other things, Micron's licensing practices, Micron's license negotiations with Rambus and other companies, Micron's Direct RDRAM license agreement with Rambus, Micron's dealings with Rambus, Micron's membership in JEDEC, the JEDEC patent policy, JEDEC patent licensing policies, and DRAMs other than JEDEC standard SDR and DDR SDRAMs (such as burst EDO and SLDRAM). Bobrow Decl. ¶ 6.

2. Terry Lee (Micron's Executive Director – Advanced Technology and Strategic Marketing): Rambus deposed Mr. Lee for three days on June 6, June 7, and August 10, 2001, yielding nearly 700 pages of deposition testimony. Rambus marked or used 90 exhibits during Mr. Lee's deposition. Rambus examined Mr. Lee about, among other topics, Micron's dealings with Rambus, Intel's adoption of Direct RDRAM, negotiations leading to Micron's Direct RDRAM license agreement with Rambus, Rambus intellectual property and patents, DRAMs other than JEDEC standard SDR and DDR SDRAMs (such as SLDRAM and burst EDO), conduct of JEDEC members and JEDEC meetings during and after Rambus's membership in JEDEC, and Micron's development and commercialization of SDR and DDR SDRAM. Bobrow Decl. ¶ 7.

3. Jeff Mailloux (DRAM Marketing Manager): Rambus examined Mr. Mailloux in deposition for two days on April 5 and April 6, 2001, obtaining over 450 pages of deposition testimony. Rambus marked or used approximately 36 exhibits during Mr. Mailloux's deposition, examining him on, inter alia, Micron's participation at JEDEC, the JEDEC patent disclosure policy, the conduct of JEDEC members before and during Rambus's membership in JEDEC, Micron's development of SDR and DDR SDRAM, alternatives to features of SDR and DDR SDRAMs, Micron's communications and negotiations with Rambus, Rambus patents and intellectual property, Intel's adoption of Direct RDRAM, Micron's Direct RDRAM license agreement with Rambus, JEDEC standards, and non-JEDEC DRAMs (such as SyncLink). Bobrow Decl. ¶ 8.

4. Roger Norwood (Micron's Design Manager (DRAM Group)): Rambus deposed Mr. Norwood on July 20, 2001, securing approximately 170 pages of deposition testimony. Rambus marked or used 15 deposition exhibits and examined Mr.

Norwood on topics including Rambus patents, JEDEC meetings, the design and operation of Micron DDR SDRAMs. Bobrow Decl. ¶ 9.

5. Kevin Ryan (Strategic Applications Engineering Manager (Computer and Consumer Products)): Mr. Ryan was deposed for two days on April 26 and April 27, 2001, which provided Rambus with over 400 pages of deposition testimony. Rambus used or marked 21 deposition exhibits. Rambus questioned Mr. Ryan about numerous subjects, including non-JEDEC DRAMs (such as SLDRAM), Micron's participation in JEDEC meetings, JEDEC's patent policy, Rambus patents and intellectual property, the design and operation of Micron's JEDEC-standard SDR and DDR SDRAMs, and alternatives to various features of JEDEC-standard SDR and DDR SDRAMs. Bobrow Decl. ¶ 10.

6. Brian Shirley (Design Operations Manager (DRAM Group)): Mr. Shirley was examined in deposition on August 8, 2001. His transcript is approximately 170 pages long. Rambus marked or used 23 deposition exhibits. Mr. Shirley was questioned in detail about many topics, including Micron's development and design of JEDEC-standard SDR and DDR SDRAMs. Bobrow Decl. ¶ 11.

7. Terry Walther (Applications Engineering Manager (Field Applications Engineering Group)): Rambus deposed Mr. Walther for two days on May 10 and May 11, 2001. This produced over 550 pages of deposition testimony. Rambus questioned him about 57 deposition exhibits. Rambus examined Mr. Walther in detail about JEDEC, Micron's participation in JEDEC, the conduct of JEDEC members during and after Rambus's membership in JEDEC, minutes of JEDEC meetings, the JEDEC

patent policy, Rambus and its patents and intellectual property, and DRAMs other than JEDEC standard SDR and DDR SDRAMs (such as SyncLink). Bobrow Decl. ¶ 12.

8. Brett Williams (Segment Enabling Specialist – Desktop PC): Rambus deposed Mr. Williams for two days on April 12 and April 13, 2001, which provided Rambus with over 450 pages of deposition testimony. Rambus questioned Mr. Williams about 41 deposition exhibits. Rambus questioned Mr. Williams about numerous topics, including JEDEC, the conduct of JEDEC members, the minutes of JEDEC meetings, the JEDEC patent policy, JEDEC’s patent licensing policy, DRAMs other than JEDEC standard SDR and DDR SDRAMs (such as burst EDO), alternatives to various features used in JEDEC standard SDR and DDR SDRAMs, and Rambus patents and technology. Bobrow Decl. ¶ 13.

9. Gene Cloud (a former Micron Vice President of Marketing who retired in 1998): Mr. Cloud was deposed on May 8, 2001. His transcript is nearly 250 pages long and he was questioned about 19 deposition exhibits. Rambus examined Mr. Cloud about, inter alia, Micron’s membership in JEDEC, the role of JEDEC, JEDEC’s patent policy, DRAMs other than JEDEC standard SDR and DDR SDRAMs (such as SyncLink), Intel’s adoption of Direct RDRAM, and Micron’s communications with Rambus. Bobrow Decl. ¶ 14.

C. Efforts to Resolve this Dispute

Micron has worked in good faith to resolve its concerns about Rambus’s 10 deposition and document subpoenas. On November 15 and November 18, 2002, counsel for Micron and counsel for Rambus conferred telephonically about the deposition and

document subpoenas. Bobrow Decl. ¶ 15. During the calls, Micron agreed to produce Messrs. Appleton, Lee, Williams, and Shirley for one day of nonduplicative deposition questioning, even though each witness had been deposed in the Delaware Action, because each of these witnesses appears on complaint counsel's preliminary witness list. Id.³ Micron further proposed that Rambus limit its depositions to these four witnesses and withdraw its subpoenas to the others. Micron made this request on the grounds that none of these witnesses is listed on complaint counsel's preliminary witness list, that nearly all of them were deposed for one, and in most cases two, days in the Delaware Action, and that Rambus acknowledged that three of them (Messrs. Cloud, Norwood, and Weinstock) were not high priority witnesses. Micron also advised Rambus (as it had in the Delaware proceedings) of its understanding that Mr. Mailloux is medically unable to sit for deposition. Id. As for the document subpoenas, Micron proposed that the documents be handled in accordance with the parties' handling of Rambus's document subpoena to Micron, served October 4, 2002. Id.

Rambus would not agree to this proposal. Rambus insisted that it depose Messrs. Appleton, Lee, Williams, Shirley, Ryan, Walther, and Mailloux on a "high priority" basis, even though each of them had been deposed in the Delaware Action.⁴ Bobrow Decl. ¶ 16. Further, Rambus would not agree to withdraw with prejudice any of its subpoenas, even for the "low priority" witnesses (Messrs. Cloud, Norwood, and Weinstock), but would only agree to withdraw the subpoenas without prejudice until after the "high priority" depositions had been completed. Id. Finally, even though the

³ Micron provided Rambus with deposition dates for Messrs. Appleton, Lee, Shirley and Williams.

⁴ Rambus did agree to limit any depositions it takes to no more than one day.

document subpoenas largely covered areas that were also included in one of Rambus's document subpoenas to Micron, Rambus refused to agree that all the modifications and limitations that it had previously agreed to in connection with the subpoena to the corporation should apply to the individual document subpoenas. Specifically Rambus agreed that the limitations on the corporate subpoena would apply to Specifications 1, 5, 6, and 7, but would not agree to those limits as to Specifications 2, 3, 4, 8, and 9. Id.

ARGUMENT

An Administrative Law Judge (“ALJ”) presiding over a Federal Trade Commission proceeding is charged with the responsibility to quash or limit any subpoena that is “unreasonably cumulative or duplicative” or unduly burdensome. 16 C.F.R. § 3.31(c)(1)(i), (iii) (providing that discovery “shall be limited by the Administrative Law Judge” if “[t]he discovery sought is unreasonably cumulative or duplicative” or if the “burden and expense of the proposed discovery outweigh its likely benefit”). Likewise, an ALJ has broad discretion to “deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense.” 16 C.F.R. § 3.31(d)(1). Here, Rambus's duplicative and burdensome deposition and document campaign against Micron should be limited.

A. The Depositions Which Rambus Seeks Are Duplicative And Unduly Burdensome

Rambus's deposition campaign imposes unreasonable burdens on Micron. Micron is not a party to these proceedings. Yet, Rambus seeks to depose ten current officers and employees of Micron, including Micron's Chief Executive Officer and numerous managers charged with Micron's engineering and marketing operations, as

well as one former Vice President.⁵ The loss of management time required for 10 witnesses to prepare and sit for deposition would be enormous, particularly given the downturn in the semiconductor industry.

This burden greatly outweighs any benefit that might be gained from the depositions. Rambus has deposed virtually all of these witnesses in the Delaware Action. In many cases, Rambus examined Micron's witnesses for multiple days. In doing so, Rambus already has discovered substantial information from these witnesses on the same or similar issues raised in these proceedings, including the JEDEC patent policy, the JEDEC licensing policy, the conduct of Rambus and others at JEDEC, the development of JEDEC-standard SDR and DDR SDRAMs, Rambus patents and intellectual property, Intel's adoption of Direct RDRAM, and alternatives to various features in JEDEC-standard SDR and DDR SDRAMs. Permitting these depositions to proceed does little more than allow Rambus to conduct duplicative, time-consuming discovery.

Moreover, the benefit to Rambus of this discovery is small because deposition testimony in these proceedings will, as a practical matter, be no more useable here than the deposition testimony Rambus secured from Micron in the Delaware Action. As we understand it, Rambus is free to use testimony from the Delaware Action for impeachment purposes in these proceedings. 16 C.F.R. § 3.33 (g)(1)(i) ("Any deposition may be used for the purpose of contradicting or impeaching the testimony of deponent as a witness."). However, because Micron and its officers and employees are not parties to this proceeding, Rambus cannot use the deposition testimony of a Micron witness –

⁵ As noted above, the tenth current Micron employee is Micron Vice President Jan Du Preez, although Micron understands that his deposition will concern activities at his former employer.

whether obtained in the Delaware Action or in this proceeding – as substantive evidence at the hearing in this proceeding unless, among other things, the witness is unavailable to testify in this matter. 16 C.F.R. § 3.33(g)(1)(iii). Because the deposition testimony of Micron witnesses from the Delaware Action is on the same footing as deposition testimony of Micron witnesses in these proceedings, there is little reason for Rambus to secure additional testimony from Micron witnesses who already have been deposed.

B. Micron’s Proposal To Limit The Deposition Subpoenas Is Reasonable

To reduce the discovery burden, non-party Micron has proposed that Rambus withdraw its subpoenas to six witnesses – Messrs. Ryan, Mailloux, Norwood, Walther, Cloud, and Weinstock. There is no need for Rambus to depose these witnesses, because all of them were deposed for multiple days in the Delaware Action and/or because complaint counsel has not listed any of them as a witness to be called in these proceedings.⁶ Moreover, Rambus acknowledged that three of these witnesses (Messrs. Cloud, Norwood, and Weinstock) are not a “high priority.”

Even though they already have been deposed in the Delaware Action, Micron, in the spirit of cooperation, has agreed to incur the burden and expense of producing Messrs. Appleton, Lee, Shirley, and Williams for one day of non-duplicative deposition questioning in this proceeding. This is a reasonable compromise, because it satisfies any concern Rambus may have about the need to depose witnesses on complaint counsel’s preliminary witness list. Micron’s proposal strikes the appropriate balance between Rambus’s desire to secure additional discovery and examine complaint counsel’s listed

trial witnesses while reducing the discovery burden on Micron and its officers and employees to a reasonable level.

C. Micron's Proposal To Limit The Document Subpoenas Is Reasonable

On October 4, 2002, Rambus served Micron with a document subpoena. Bobrow Decl., Exh. B. The subpoena contains 67 specifications, some of which contain numerous subparts. Before Rambus served Micron with deposition and document subpoenas directed to individual officers and employees, Micron and Rambus previously had engaged in extensive discussions about the scope of Rambus's prior document subpoena to Micron. Micron and Rambus reached agreement on responses to a number of these specifications, but disagreed on others. Those disagreements currently are the subject of motion practice before the Administrative Law Judge.

Rambus's document subpoenas to the individual Micron officers and employees should be quashed or limited. Specifications 1 through 7 in the individual requests are duplicative of Specifications contained in Rambus's subpoena to Micron. These Specifications should be handled in the same way that they are being handled with respect to Rambus's subpoena to Micron. In other words, if Rambus and Micron agreed to limit or defer document discovery from Micron, then document discovery on the same or similar issues to the individual witnesses should be limited or deferred. Similarly, if Micron and Rambus agreed that Micron would produce documents responsive to certain Specifications, then the individual witnesses should produce documents responsive to

⁶ Privileged Material Redacted

those same or similar Specifications.⁷ The subpoenas to individual Micron witnesses should not be a “back door” to vitiate limitations previously agreed to regarding the scope of Micron’s document production.

Micron objects and moves to limit Specifications 2, 3, and 4. These Specifications generally are subsumed within Specifications included in Rambus’s subpoena to Micron. These Specifications should be treated in the same manner as the parties have treated similar Specifications in the Micron document subpoena.

Micron objects and moves to quash Specifications 8 and 9. Specification 8 seeks documents “sufficient to identify any attorneys you consulted in any way on issues pertaining to Rambus, Rambus’s technology, Rambus’s intellectual property rights or claims, JEDEC, and/or JEDEC policies.” Micron already has produced to Rambus a privilege log from the Delaware Action that identifies documents withheld on grounds of privilege that were generated before December 2000. A request for documents identifying privileged communications after December 2000 is not likely to lead to discoverable evidence, and would be unduly burdensome, because Micron and Rambus were engaged in active litigation in Delaware over Rambus patents and JEDEC beginning in August 2000.

Specification 9 also should be quashed as unduly burdensome and duplicative. It seeks documents “you or your employer provided to the Federal Trade Commission between January 1, 2001 and the present.” Micron produced a large number of documents to the FTC staff during the investigation (most consisting of documents produced by Rambus in the Delaware Action). Micron understands that those documents

⁷ Although Rambus was willing to follow this procedure for Specifications 1, 5, 6, and 7,

have been provided to Rambus. There is no reason for Micron or its officers and employees to re-produce those documents.

CONCLUSION

For the foregoing reasons, Micron's motion to quash or limit Rambus's deposition and document subpoenas to present and former Micron officers and employees should be granted.

Respectfully submitted,

it refused to do so for Specifications 2, 3, 4, 8, and 9.